United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-7376

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

NO. 76-7376

BLANCHE MITCHELL,

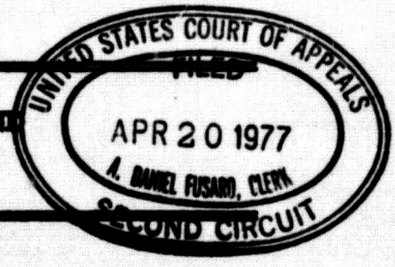
Appellant,

vs.

NATIONAL BROADCASTING COMPANY and S. THEODORE NYGREEN, Manager of Information Services, National Broadcasting Company,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



APPELLANTS PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-7376

BLANCHE MITCHELL,

Appellant,

vs.

NATIONAL BROADCASTING COMPANY and
S. THEODORE NYGREEN, Manager of
Information Services, National
Broadcasting Company,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPELLANTS PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-7375

BLANCHE MITCHELL,

Appellant,

vs.

NATIONAL BROADCASTING COMPANY and
S. THEODORE NYGREEN, Manager of
Information Services, National
Broadcasting Company,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPELLANTS PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Plaintiff-appellant Blanche Mitchell (hereinafter, "plaintiff"), hereby petitions the Court for rehearing and for reconsideration of its decision entered April 6, 1977 affirming an Order of the District Court granting the motion for summary judgment of defendant-appellee, National Broadcasting Company, et ano (hereinafter NBC) dismissing plaintiff's complaint on

the ground that plaintiffs resort to the state administrative and judicial proceedings had a res judicata effect barring a later action under 42 U.S.C. §1981. The District Court's order and its affirmances has the effect of forever barring an examination into the merits of plaintiff's claim even though no forum which has procedures meeting the minimal requirements of due process has ever inquired into the merits of plaintiff's claim of unlawful racial discrimination.

Plaintiff respectfully petition this Court for rehearing or the ground that the majority of the panel overlooked or misapprehended the procedures employed by the New York State Division on Human Rights (hereinafter, State Division) in determining probable cause. Plaintiff further respectfully suggest that inasmuch as the panels decision involves important questions affecting the administration of federal and state fair employment laws this matter be reheard en banc.

Statement of the Case

On December 3, 1973, Blanche Mitchell, who is black, filed a complaint with the New York State Division on Human Rights alleging that she was discharged by NBC because of her race. Following two informal conferences the Regional Director of the State Division filed an opinion dismissing the complaint on the ground of lack of probable cause. Ms. Mitchell appeal d, pro se, to the State Human Rights Appeal Board which affirmed by a

vote of 2 to 2. Thereafter Ms. Mitchell obtained counsel and appealed to the Appellate Division of the New York State Supreme Court. On November 7, 1974 the Appellate Division affirmed without opinion. On November 20, 1975 Ms. Mitchell, now represented by other counsel, filed this action in the Southern District of New York alleging violations of 42 U.S.C. §1981. Upon NBC's motion for summary judgment Judge Metzner dismissed the complaint on the ground that the state administrative and judicial proceedings had a res judicata effect barring plaintiffs later action under 42 U.S.C. §1981. A timely notice of appeal was filed on July 29, 1976. Briefing was completed on December 2, 1976. The case was argued before a panel of this Court consisting of Judges Lumbard, Feinberg and Mishler. On April 6, 1976 a majority of the panel affirmed the District Court decision on the ground that having appealed beyond the State Human Rights Appeal Board to the Appellate Division, plaintiff's claim is now barred by res judicata. Judge Feinberg wrote a dissenting opinion where he pointed out that while the distinction between a state judicial and a state administrative determination relied on by the majority is important it should not be controlling in this case because of the important policy considerations that attend the federally protected right to be free of discrimination on the basis of race and because of the

failure of the state procedures to provide plaintiff with the same safeguards available in federal court.

Grounds for Rehearing

1. The Panel Misapprehended the Procedural Protections Available to Plaintiff In the State Administrative Process.

Underlying the opinion of the majority of the panel is its incorrect appraisal that the procedures before the District Director of the State Division on Human Rights affecting a probable cause determination afford plaintiff the same protections had she been faced with a motion for summary judgment under the Federal Rules of Civil Procedure. See Slip Opinion at page 2726. The procedures available before the State Division on a probable cause determination fall far short of the due process protections afforded by Rule 56, F.R. Civ. P.

In New York State Division of Human Rights v. University of Rochester, ___ App. Div. 2d. ___, 386 N.Y.S. 2d. 147 (4th Dept. 1976), the Appellate Division held that prior to a probable cause determination access to discovery devices is entirely in the hands of the Division. Beginning at page 148 the 4th Department said:

> The subpoenas are quashed. A private attorney may not issue a subpoena duces tecum during the investigatory stage of discrimination proceedings.
>
> There is no statutory provision in the Executive Law for the issuance of subpoenas

> by private attorneys, although the statute provides that the Division may issue a subpoena at "any stage of any investigation or proceeding before it" and may make rules with respect thereto (Executive Law § 295[7]). The Division rules permit private attorneys representing complainants to issue subpoenas as provided in the CPLR (9 NYCRR 465.10). In turn, CPLR 2302 provides that an attorney may issue subpoenas in administrative proceedings. This power to issue subpoenas, however, was designed to make evidence available at a hearing on the merits. Before a determination of probable cause, the complainant may be represented by an attorney but the matter is to be investigated by the State Division. Thus, the statute provides for various preliminary procedures designed to promote amicable settlements (see Executive Law, § 297) and for the dismissal of a complaint "in the unreviewable discretion" of the Division if it finds that the complaint lacks substance. If the Division requires preliminary information obtainable by subpoena, the statute provides it with that authority, but before the hearing stage the Division should be free to work its will without interference by the complainant's private attorney, and the complainant is not permitted to use the subpoena power as a discovery device (see McKinney's Cons. Laws of N.Y., Book 7B, CPLR 2302, David D. Siegel, Practice Commentary). (Emphasis added.)

Zeroing in on the court's reference to plaintiff's private attorney, NBC led the panel to believe that a different rule applies if the complainant is not represented by an attorney. See NBC's brief at page 45. The majority apparently accepted NBC's construction of the State law. See Slip Opinion at page 2726 n. 7. Any doubt as to the import of University of Rochester, supra, or the intent and practice of the State

Division is dispelled by the letter of the General Counsel of the State Division at page A-1 of the appendix to this brief. A complainant's entitlement to use discovery devices is limited to the hearing stage (i.e., after a probable cause determination) and it matters not whether the complainant is or is not represented by counsel. Prior to a probable cause determination the Division is free to work its will without "interference" by the complainant or her attorney. See University of Rochester, supra.

As Judge Feinberg points out in his dissenting opinion, review of the decision of the State Division is quite limited. See Slip Opinion at pages 2742-2743. The review provided plaintiff was limited to the issue of whether or not dismissal for lack of probable cause was "arbitrary, capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." See Executive Law §297-a subdivision 6 par. e and Mayo V. Hopeman Lumber and Mfg. Co., 33 App. Div. 2d 310, 307 N.Y.S. 2d 691, 694 (4th Dept. 1970). The 4th Department recently reaffirmed this well established rule holding:

> [T]he statute provi[illegible]or various preliminary procedures designed to promote amicable settlements (see Executive Law §297) and for the dismissal of a complaint "in the unreviewable discretion" of the Division if it finds that the complaint lacks merit. (Emphasis added.) N.Y.S. Div. on Human Rts. v. Univ. of Rochester, supra, 386 N.Y.S. 2d at p. 149.

While the Appellate Division will reverse a dismissal of a complaint for lack of probable cause unless it appears virtually that as a matter of law the complaint lacks merit, see Mayo v. Hopeman Lumber & Mfg. Co., supra, that review is based on the record produced at the District Director level within the State Division. And as noted above the complainant has no control over the development of that record prior to a probable cause determination.[1/]

Rule 56, F.R. Civ. P. provides plaintiff with substantially greater procedural protections. Assuming that the same standard of proof attends a summary judgment motion as a probably cause determination, before a motion for summary judgment is granted the party opposing the motion must be afforded an opportunity

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1/ The majority's review at Slip Opinion page 2727, n. 8 of the facts in Mayo v. Hopeman Lumber & Mfg. Co., supra, fails to focus on the real dilemma plaintiff faced in this case. In Mayo, the 4th Department criticized the failure of the Division to develope an adequate record but the holding of that case rests squarely on the finding that that record, fragmentary as it was, did not permit a finding that as a matter of law the complaint lacked merit. See Mayo, supra, 307 N.Y.S. 2d at 695. Plaintiff Mitchell's claim rests on the fact that State Divisions procedures do not permit her to uncover facts that would require a probable cause determination. The failure of the Division to grant her discovery requests is not reviewable. See Univ. of Rochester, supra.

to do discovery if he gives valid reasons why he cannot present facts essential to justify his opposition to the motion. See Rule 56(f). In federal court plaintiff would have been entitled, as a matter of right, to depose the witnesses which the State Division in the exercise of its discretion to "work its will without interference", see University of Rochester, supra, chose not to interview.[2/] The availability of this procedural protection under the Federal Rules of Civil Procedure is of particular significance in employment discrimination cases where the records and witnesses necessary for a fair examination into the merits of the claim are usually under the exclusive control of the defendant-employer.

In summary plaintiff simply did not and could not obtain

2/ By deposing employees other than those supervisors presented by NBC, plaintiff would not be embarking on a mere "fishing expedition." NBC's purported reason for discharging plaintiff was based on its claim that plaintiff was "abusive, bothersome, taunting, argumentative and uncooperative," but as noted by the dissenting members of the State Human Rights Appeal Board, the documents submitted in support of these conclusions were "at best second-hand information." See Appendix at page 42a. Deposition of those directly involved would have been far more revealing than the self-serving documents on which the Division's no probable cause determination was based.

Of course the unsworn statements used before the State Division in its no probable cause decision would not be considered in a Rule 56 motion. See Schwartz v. Compagnie General Transatlantique, 405 F.2d 270 (2d. Cir. 1968).

in the state administrative and judicial process, the due process protections afforded in the federal courts.[3/]

2. The Majority Opinion May Have the Effect of Undermining Enforcement of New York Fair Employment Laws.

All members of the panel recognize that "Congress 'long evinced a general intent to accord parallel or overlapping remedies against discrimination.'" Slip Opinion at page 2739 and further that "in general, submission of a claim to one forum does not preclude a later submission to another." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Both the majority and dissent properly accept the principle that resort to a state administrative proceeding will not bar a subsequent court action under Title VII or 42 U.S.C. §1981 and that the same policy considerations underlying the treatment of state proceedings in a Title VII case apply in a 42 U.S.C. §1981 action. See Slip Opinion at pages 2734 and 2739. The majority

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3/ Contrary to the majority's statement at Slip Opinion page 2727, plaintiff's due process argument is directed to the standards for determining probable cause. See e.g., Plaintiffs Brief at page 11-14. Plaintiff's description of her actual experience in the state process merely illustrates the inadequacy of the state procedures for winnowing out frivolous claims. Had plaintiff been afforded the procedural protections afforded by Rule 56, F.R. Civ. P., her claim would not have been summarily rejected.

and dissent reach different results however, the majority holding that by pursuing her state remedies into state court, plaintiff was thereby barred by application of the doctrine of res judicata from pursuing her claim in federal court. Under the approach taken by the majority, had plaintiff stopped short of taking an appeal to state court res judicata would not have applied. The dissent would give effect to the intent of Congress to afford complainants with claims of racial discrimination in employment independent and overlapping remedies. See Slip Opinion at page 2745. As the dissent notes, the courts should not use the doctrine of res judicata to prune away at what appear to be redundancies in this scheme particularly here where plaintiff has never received a formal hearing on her complaint and only limited judicial review. See Slip Opinion at page 2745.

The effect of the majority opinion however goes far beyond Ms. Mitchell's individual claim. It has important ramifications on the administration of New York's fair employment statute and on judicial administration in this Circuit. Plaintiff has included in the appendix to this brief a letter of the General Counsel of the New York State Division on Human Rights expressing her concern with the impact of the majority opinion on the agency and on the rights of complainants who come before it.[3a/] Plaintiff highlight some of those concerns here:

3a/ The appendix also includes a letter of the General Counsel of the New York City Commission on Human Rights expressing the concerns of that agency.

1. The majority opinion raises the question of whether or not it will be necessary for the State Human Rights Appeal Board[4/] to give notice to the approximately 50 individuals per month who take appeals from no probable cause determinations that appeal of the Board's decision may foreclose a later action in federal court. However the giving of such a notice would not only subject the Board to criticism but may, in the General Counsel's opinion, impair the validity of its orders.

2. The suggestion by the majority that a different rule might apply if the respondent loses before the State Board appeals to the Appellate Division and wins, see Slip Opinion at page 2735, n. 13, may be difficult to administer and will undoubtedly spawn additional litigation because of the wide variety of contexts in which appeals may be taken beyond the Appeal Board.

3. While in the short-term effect of the majority opinion will probably reduce the number of such cases being brought in the federal courts, it will in the long run cause a substantial increase in the number of employment discrimination cases brought in the federal courts, as complainants who lose before state and local fair employment practices agencies become

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4/ The Board is independent of the State Division. The General Counsel of the State Division has no authority over the actions of the Board.

generally aware that a resort to state judicial review will foreclose the possibility of a federal suit.[5/]

For the reasons set forth above this Court should reconsider its decision of April 6, 1976 and the case should be set for rehearing en banc.

Respectfully submitted,

O. P. Sherwood

JACK GREENBERG
O. PETER SHERWOOD
RONALD L. ELLIS
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Appellant

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I have this 20th day of April, 1977, mailed a copy of the foregoing

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5/ While there may be doubt as to the number of individuals acting, pro se, will have the legal sophistication to recognize that their federal rights would be affected by appealing to state court, it is highly likely that private or legal services attorneys who, like the Legal Aid Society lawyer who represented Ms. Mitchell in the Appellate Division, undertake to represent a complainant after he or she, acting pro se, has lost before the Appeal Board, will eschew the state judicial process in favor of the more clearly defined body of federal fair employment law.

APPELLANTS PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC upon counsel for appellees:

Howard L. Ganz
Proskauer, Rose, Goetz & Mendelsohn
300 Park Avenue
New York, New York 10022

by placing same in the United States mail, adequate postage prepaid.

C. P. Sherwood
ATTORNEY FOR APPELLANT

APPENDIX TO APPELLANTS PETITION
FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
TWO WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

WERNER H. KRAMARSKY
Commissioner

April 20, 1977

O. Peter Sherwood, Esq.
NAACP Legal Defense and Educational Fund
10 Columbus Circle
New York, New York 10019

Dear Mr. Sherwood:

With further reference to our telephone conversation, it has always been the practice of this Division to view as discretionary the manner in which an investigation is conducted so long as it is thorough and fair.

Accordingly, when a complainant not represented by Counsel requests, during the investigation stage, that subpoenas be issued for certain persons or documents, the Division field investigator, in conjunction with supervisory staff at the regional office involved, may grant or disagree with the complainant's request, depending upon the completeness of the investigation without the materials or witnesses proposed by the complainant.

Should the investigator determine that a complete investigation warrants exploring avenues suggested by complainant, such suggestions are pursued to the degree they appear relevant and productive of evidence needed for a determination of probable cause or no probable cause.

In sum, the complainant does not ultimately control the course of an investigation.

Very truly yours,

Beverly Gross

BEVERLY GROSS
General Counsel

BG/yr

A-1

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
TWO WORLD TRADE CENTER
NEW YORK, NEW YORK 10047

WERNER H. KRAMARSKY
Commissioner

April 14, 1977

O. Peter Sherwood, Esq.
NAACP Legal Defense and Educational Fund
10 Columbus Circle
New York, N. Y. 10019

Re: Blanche Mitchell v. National Broadcasting Company, et al

Dear Mr. Sherwood:

Thank you for bringing to my attention the April 6, 1977 decision of the United States Court of Appeals, Second Circuit, in the referenced case, wherein the two-member majority held (Feinberg, C. J., dissenting), that a 42 U.S.C. § 1981 civil rights action is barred by res judicata when the plaintiff's complaint to the State Division of Human Rights has been dismissed for lack of probable cause and the dismissal has been upheld by the Appellate Division of the State Supreme Court on judicial review.

Even though this agency did not sustain the plaintiff's complaint, we respectfully disagree with the Second Circuit decision. As a civil rights agency we have necessarily relied upon the settled legal principle that in the civil rights field, the law encourages multiple remedies.

In the case at bar, we have a particular concern with the majority's discussion, at pages 2733-2738, of the interrelationship between Title VII, § 1981 and state fair employment practices laws. The majority seems to hold that, even if it be assumed arguendo without so deciding, a claimant who seeks state judicial review of an adverse administrative decision does not lose the right to prosecute a Title VII action (which proposition, we believe, has been sustained in other federal court decisions), such state judicial review at the instance of the aggrieved party bars a subsequent § 1981 action. We fail to see the logic in any such implied distinction between the availability of Title VII and § 1981

remedies. In this regard it should be noted that most of the complainants to this State Division are unrepresented by private counsel. As in the case at bar, the majority of complaints filed are dismissed by non-legal personnel at the Regional Director level. (In 1976, out of 4131 Regional Director case closings, 2200 were dismissed for lack of probable cause.) In addition, even among cases wherein probable cause is found, many are dismissed after public hearing. In either event, the losing complainant may appeal to the State Human Rights Appeal Board under § 297-a. Complainants' appeals are now running at the rate of about 50 per month. These appellants to the Appeal Board rarely have private counsel. In a typical month, approximately a half dozen complainants whose dismissals on the merits have been affirmed by the Appeal Board petition for judicial review under § 298. Usually, their "petitions" reflect their lack of sophistication in legal form and substance, since they continue to act pro se at the judicial review stage as well.

The majority decision may create a most difficult dilemma. Should the Appeal Board notify every complainant whose dismissal on the merits it affirms that by seeking judicial review in the Appellate Division he or she may foreclose a federal action? The giving of such a notice would undoubtedly subject the Appeal Board to severe criticism and perhaps even impair the validity of its order, but it may be necessary to give it in order to attempt to protect the complainant. However, since most of these complainants are lay persons, it is doubtful whether such a notice would be fully understood by them. Moreover, in many cases, by the time a complainant has lost on judicial review before the Appellate Division, it is too late to commence a Title VII action, so § 1981 becomes the last avenue for a federal adjudication of his or her rights.

It is to be noted, further, that the majority distinguishes the instant situation from one in which the complainant prevails before the State Division, the respondent appeals to the Appeal Board, loses, seeks judicial review in the Appellate Division, and wins there, by obtaining a judgment dismissing the complaint. The majority states that it expresses no opinion as to whether res judicata applies in such a case but implies that it should not, because deferral to the state remedy was required by Title VII and the pursuit of state procedure to a judicial determination was respondent's choice, not complainant's. But the situation is not always so clear-cut. Often the respondent does not seek judicial

review but fails to comply with the Division's order. In such case, the Division petitions the Appellate Division to enforce the order. It has been held that an enforcement proceeding "searches the record", permitting the Appellate Division to invalidate the State Division's order, just as if respondent had petitioned for judicial review. E.g., State Division of Human Rights v. Bystricky, 30 N.Y.2d 322, 284 N.E.2d 560 (1972). It also frequently occurs that a respondent will petition for judicial review and that State Division will then cross-petition for enforcement, or that respondent will petition for judicial review, lose, and then the State Division will petition for enforcement. Indeed, we have even had cases in which the respondent has petitioned for judicial review to annul the State Division's order and the complainant has petitioned the same court for judicial review to expand the State Division's order.

My purpose in setting forth these diverse situations is to suggest that the test implied in footnote 13 -- whether judicial review was the complainant's choice or the respondent's -- may not be a workable one.

One final thought. The immediate effect of the majority decision in this case would be to limit access to the federal judiciary. However, the long run effect may be quite the reverse. If complainants who lose before this and other state and municipal administrative agencies become generally aware that a resort to state judicial review will foreclose the possibility of a federal suit, a substantial number of them may opt not to seek state judicial review but to commence a federal suit immediately following their administrative dismissal. If these complainants were permitted to pursue state judicial review without fear of being subject to the bar of res judicata in a subsequent federal action, many of them might never bring a federal action. They might prevail on state judicial review or, even if they do not, they might feel satisfied that they have had their "day in court."

I have no objection to your disclosing the contents of this letter in any subsequent proceedings in the instant matter.

Very truly yours,

Beverly Gross

BEVERLY GROSS, General Counsel

BG:AJS:es
cc: Werner H. Kramarsky, Commissioner
Alan J. Saks, Associate Attorney
Deborah Greenberg, Esq.
NAACP

The City of New York

COMMISSION ON HUMAN RIGHTS
52 DUANE STREET, NEW YORK, N. Y. 10007
Telephone: 566-5050

ELEANOR HOLMES NORTON, *Chairman*
DAVID H. LITTER, *Vice Chairman*
PRESTON DAVID, *Executive Director*

In reply refer to:

April 20, 1977

O. Peter Sherwood, Esq.
Legal Defense Fund
NAACP Legal Defense and
Educational Fund, Inc.
10 Columbus Circle
New York, New York 10019

Re: Blanche Mitchell v. National Broadcasting Co. and Theodore Nygreen, Docket No. 76-7376

Dear Mr. Sherwood:

Thank you for bringing to my attention the recent Second Circuit opinion in Blanche Mitchell v. National Broadcasting Co. in which the Court determined that a State Court's affirmance of an administrative agency order, dismissing a complaint, barred the subsequent commencement of a federal civil rights action pursuant to 42 U.S.C. Section 1981. The Court's decision was predicated, in part, upon a finding that the State Court's affirmance has a res judicata effect since the same issues decided in the Appellate Division were identical to those raised by the Section 1981 claim. Implicit in the Mitchell decision is the belief that a party proceeding at an administrative agency has the same protections as those afforded a litigant in a motion for summary judgment pursuant to the Fed. R. Civ. Proc. 12 (b) and 56.

As General Counsel of the City Commission, I share your concerns for the potential problems emanating from the decision. The Commission agrees with the plaintiff's position that since resort to state court proceedings would not bar a subsequent federal action under Title VII, the same policy consideration should preclude any prohibitions when proceeding under Section 1981. Indeed, we have assumed this position in the processing of complaints at the Commission. The policy considerations underlying Title VII which

permits a de novo review of the merits of the case, should be consistent with those underlying Section 1981 since Congress intended that racial discrimination in employment was important enought to warrant independant and overlapping federal remedies.

A wide application of the Court's determination in Mitchell could potentially have devastating effects upon litigants who elect to pursue their claims at the City Commission on Human Rights. Unlike the State, the City does not have a formalized State Appeals Board to which an aggrieved party may appeal his claim.

Section B1-8.0 (2) of the Administrative Code of the City of New York, permits a party in receipt of a no probable cause determination, within thirty days, to request the Chairman of the Commission to review the determination. Thereafter, if the determination is affirmed, the party has thirty days to commence a Section B1-9.0 review in the Special Term of the Supreme Court or lose his right to appeal. The Mitchell opinion imposes an enormous burden upon the complainant, who is often unrepresented by counsel, to elect his remedy within the thirty day period.

If the complainant proceeds in State Court there is no de novo hearing on the merits of the case unlike that which would occur in a Title VII and Section 1981 action. Consequently, it would seem that the potential impact upon the Federal Court calendar would be greater because a complainant may elect to proceed immediately in Federal Court rather than assuming the risk of proceeding in State Court where there is no de novo hearing on the merits. Additionally, because of this potential risk, the Commission would be compelled to advise complainants of the res judicata effect of the State Supreme Court decision. In the calendar year 1976, the Commission issued 136 no probable cause determinations. Thus, the potential effect upon the Federal Court calendar should aggrieved parties elect a federal remedy, may very well prove to be more widespread than the Court envisioned.

Although the Commission vigorously supports its determinations, it is cognizant of the inherent problems which are endemic to administrative agencies charged with the duty of resolving complaints. These problems are a direct consequence of substantial caseload versus inadequate staff and budgets. Moreover, a complainant during the investigatory stage does not enjoy the same protections as a litigant

resisting a motion for summary judgment in that he very often is unrepresented by counsel and has no individual subpoena power to obtain information totally within the control of the respondent. Therefore, the alternative federal process available to a complainant is helpful in insuring that all the factual issues are fully explored and is consistent with applicable federal law.

I have no objection to the use of this letter in any subsequent proceedings or hearings.

Yours truly,

Judith T. Pierce

Judith T. Pierce
General Counsel

cc: Eleanor Holmes Norton
Chairperson
City Commission on Human Rights